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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 LEON ANTHONY DONNAN,
12 CDCR #T-73830,

13 Plaintiff,

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15 vs.
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17 COUNTY OF SAN DIEGO; EDNA
18 MILLOY; STEVEN MANNIS;
19 JOHN GILL,
20

21 Defendants.
22

Civil No. 11cv0315 MMA (BGS)

ORDER:

**(1) GRANTING PLAINTIFF'S
MOTION TO PROCEED IN
FORMA PAUPERIS, IMPOSING
NO PARTIAL FILING FEE AND
GARNISHING \$ 350 BALANCE
FROM PRISONER'S TRUST
ACCOUNT PURSUANT
TO 28 U.S.C. § 1915(a)
[ECF No. 2]; and**

**(2) DISMISSING COMPLAINT FOR
FAILING TO STATE A CLAIM AND
AS FRIVOLOUS PURSUANT TO
28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b)**

23 Leon Anthony Donnan ("Plaintiff"), a state prisoner currently incarcerated at the Richard
24 J. Donovan Correctional Facility located in San Diego, California, and proceeding in pro se, has
25 filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff alleges that his civil rights
26 were violated when he was housed at the Vista Detention Facility.

27 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead he
28 has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [ECF
No. 2].

I.

MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the six-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner must collect subsequent payments, assessed at 20% of the preceding month's income, in any month in which the prisoner's account exceeds \$10, and forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

The Court finds that Plaintiff has no available funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's IFP case based solely on a "failure to pay ... due to the lack of funds

1 available to him when payment is ordered.”). Therefore, the Court **GRANTS** Plaintiff’s Motion
 2 to Proceed IFP [ECF No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1).
 3 However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded
 4 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
 5 § 1915(b)(1).

6 **III.**

7 **SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

8 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 9 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused
 10 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 11 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
 12 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 13 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,
 14 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
 15 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
 16 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)
 17 (§ 1915A); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
 18 § 1915A).

19 “[W]hen determining whether a complaint states a claim, a court must accept as true all
 20 allegations of material fact and must construe those facts in the light most favorable to the
 21 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 22 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
 23 duty to liberally construe a pro se’s pleadings, see *Karim-Panahi v. Los Angeles Police Dept.*,
 24 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
 25 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal interpretation to a
 26 pro se civil rights complaint, the court may not “supply essential elements of claims that were
 27 not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th
 28 Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations

are not sufficient to withstand a motion to dismiss.” *Id.*

A. 42 U.S.C. § 1983 Liability

Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person acting under color of state law committed the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 2122 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

B. Access to Courts claim

Plaintiff claims that while he was housed at the Vista Detention Facility, jail officials failed to provide him with adequate access to the jail’s law library. Prisoners do “have a constitutional right to petition the government for redress of their grievances, which includes a reasonable right of access to the courts.” *O’Keefe v. Van Boening*, 82 F.3d 322, 325 (9th Cir. 1996); *accord Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995). In *Bounds*, 430 U.S. at 817, the Supreme Court held that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons who are trained in the law.” *Bounds v. Smith*, 430 U.S. 817, 828 (1977). To establish a violation of the right to access to the courts, however, a prisoner must allege facts sufficient to show that: (1) a nonfrivolous legal attack on his conviction, sentence, or conditions of confinement has been frustrated or impeded, and (2) he has suffered an actual injury as a result. *Lewis v. Casey*, 518 U.S. 343, 353-55 (1996). An “actual injury” is defined as “actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.” *Id.* at 348; *see also Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994); *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989); *Keenan v. Hall*, 83 F.3d 1083, 1093 (9th Cir. 1996).

Here, Plaintiff has failed to alleged any actions with any particularity that have *precluded* his pursuit of a non-frivolous direct or collateral attack upon either his criminal conviction or sentence or the conditions of his current confinement. *See Lewis*, 518 U.S. at 355 (right to access to the courts protects only an inmate’s need and ability to “attack [his] sentence[], directly

1 or collaterally, and ... to challenge the conditions of [his] confinement.”); *see also Christopher*
 2 *v. Harbury*, 536 U.S. 403, 415 (2002) (the non-frivolous nature of the “underlying cause of
 3 action, whether anticipated or lost, is an element that must be described in the complaint, just as
 4 much as allegations must describe the official acts frustrating the litigation.”). Moreover,
 5 Plaintiff has not alleged facts sufficient to show that he has been actually injured by any specific
 6 defendant’s actions. *Lewis*, 518 U.S. at 351.

7 In short, Plaintiff has not alleged that “a complaint he prepared was dismissed,” or that
 8 he was “so stymied” by any individual defendant’s actions that “he was unable to even file a
 9 complaint,” direct appeal or petition for writ of habeas corpus that was not “frivolous.” *Lewis*,
 10 518 U.S. at 351; *Christopher*, 536 U.S. at 416 (“like any other element of an access claim[,] ...
 11 the predicate claim [must] be described well enough to apply the ‘nonfrivolous’ test and to show
 12 that the ‘arguable’ nature of the underlying claim is more than hope.”). Therefore, Plaintiff’s
 13 access to courts claims must be dismissed for failing to state a claim upon which section 1983
 14 relief can be granted. *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

15 C. Inadequate medical care claims

16 Plaintiff also alleges that jail officials denied him adequate medical care for his Hepatitis
 17 and a nail fungus problem. (*See Compl.* at 3-5.) A court “may take notice of proceedings in
 18 other courts, both within and without the federal judicial system, if those proceedings have a
 19 direct relation to matters at issue.” *United States ex rel. Robinson Rancheria Citizens Council*
 20 *v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). The Court finds that Plaintiff has already
 21 litigated these claims in *Donnan v. Cook, et al.*, S.D. Cal. Civil Case No. 08cv2157 DMS (AJB).
 22 A prisoner’s complaint is considered frivolous under 28 U.S.C. § 1915A(b)(1) if it “merely
 23 repeats pending or previously litigated claims.” *Cato v. United States*, 70 F.3d 1103, 1105 n.2
 24 (9th Cir. 1995) (construing former 28 U.S.C. § 1915(d)) (citations and internal quotations
 25 omitted). Because Plaintiff has already litigated the same claims presented in the instant action
 26 in *Donnan v. Cook, et al.*, S.D. Cal. Civil Case No. 08cv2157 DMS (AJB), the Court hereby
 27 **DISMISSES** Plaintiff’s inadequate medical care claims. *See Cato*, 70 F.3d at 1105 n.2; *Resnick*,
 28 213 F.3d at 446 n.1.

1 **III.**

2 **CONCLUSION AND ORDER**

3 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

4 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 2] is
5 **GRANTED**.

6 2. The Secretary of California Department of Corrections and Rehabilitation, or his
7 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee owed in
8 this case by collecting monthly payments from the account in an amount equal to twenty percent (20%)
9 of the preceding month's income and forward payments to the Clerk of the Court each time the amount
10 in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE
11 CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

12 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
13 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
14 Sacramento, California 95814.

15 **IT IS FURTHER ORDERED** that:

16 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.
17 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave from the
18 date this Order is "Filed" in which to file a First Amended Complaint which cures all the deficiencies
19 of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without reference
20 to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants not named and all claims not re-
21 alleged in the Amended Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d
22 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint fails to state a claim upon which
23 relief may be granted, it may be dismissed without further leave to amend and may hereafter be
24 counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th
25 Cir. 1996).

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1 5. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

2 **IT IS SO ORDERED.**

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4 DATED: March 30, 2011

A handwritten signature in cursive script, reading "Michael M. Anello", written in black ink over a horizontal line.

5 Hon. Michael M. Anello
6 United States District Judge
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